No. 93-45

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In the Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL INTERFAITH CABLE COALITION, INC. (OPERATING AS THE VISION INTERFAITH SATELLITE NETWORK), ET AL., APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE FEDERAL RESPONDENTS TO AFFIRM

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QUESTION PRESENTED

Whether Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1471-1481, which require cable system operators to devote a portion of their channel capacity to the carriage of commercial broadcast stations and noncommercial educational broadcast stations, violate the Establishment or Free Exercise Clauses of the First Amendment.

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MOTION OF THE FEDERAL RESPONDENTS TO AFFIRM

Pursuant to this Court's Rule 18.6, the United States and the Federal Communications Commission move to affirm the judgment of the district court.

OPINION BELOW

The opinion of the district court (J.S. Apps. C-E) is reported at 819 F. Supp. 32.

JURISDICTION

Appellants' challenge to the constitutionality of Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Act), Pub.

L. No. 102-385, 106 Stat. 1471-1481; 47 U.S.C. 534 and 535,[1] was heard by a three-judge district court convened pursuant to Section 23 of the 1992 Act, 106 Stat. 1500; 47 U.S.C. 555(c)(1), and 28 U.S.C. 2284. The judgment of the district court was entered on April 12, 1993. On May 3, 1993, notices of appeal were filed pursuant to Section 23 of the 1992 Act, 106 Stat. 1500; 47 U.S.C. 555(c)(2). The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

1. Section 4 of the 1992 Act adopts a limited must-carry obligation generally applicable to local commercial broadcast stations. A cable system with more than 300 subscribers but 12 or fewer active usable channels must carry "the signals of at least three local commercial television stations." § 4, 106 Stat. 1471; 47 U.S.C. 534(b)(1)(A). For systems with more than 300 subscribers and more than 12 active usable channels, a cable operator must devote up to one-third of its channel capacity to local commercial broadcast stations. § 4, 106 Stat. 1471; 47 U.S.C. 534(b)(1)(B).[2] In general, a cable operator must retransmit, in its entirety, the programming of a

[1] Citations to the United States Code relating to the provisions of the 1992 Act refer to the place in Supp. IV 1992 where those provisions are to be codified.

[2] If there are not enough full power local commercial broadcast stations to fill the requirements of the must-carry provisions, a cable operator with up to 35 active channels must carry one qualified low power station and an operator with more than 35 channels must carry two such stations. See § 4, 106 Stat. 1473-1474; 47 U.S.C. 534(c)(1); see also § 4, 106 Stat. 1476-1477; 47 U.S.C. 534(h)(2) (defining "qualified low power station").

broadcast station carried to fulfill must-carry obligations. § 4, 106 Stat. 1471-1472; 47 U.S.C. 534(b)(3). And absent an agreement to the contrary, a commercial broadcast station must be carried in the channel position in which it is presently carried or was carried at specified times in the past. § 4, 106 Stat. 1472; 47 U.S.C. 534(b)(6). Finally, with some exceptions, a cable operator may not charge a fee for carrying broadcast signals in fulfillment of the must-carry provisions. § 4, 106 Stat. 1473; 47 U.S.C. 534(b)(10).[3]

For local noncommercial educational stations, Section 5 of the 1992 Act imposes similar requirements. Thus, a cable system with 12 or fewer channels must carry "one qualified local noncommercial educational television station." § 5, 106 Stat. 1478; 47 U.S.C. 535(b)(2)(A). A system having between 13 and 36 channels must carry between one and three such stations, and a system with more than 36 channels must carry "each qualified local noncommercial educational television station requesting carriage." § 5, 106 Stat. 1478; 47 U.S.C. 535(b)(3)(A) and (D). The 1992 Act requires a cable operator, in some circumstances, to import distant signals (§ 5, 106 Stat. 1478; 47 U.S.C. 535(b)(3)(B)), but provides protection against substantial duplication of local noncommercial educational stations receiving carriage. § 5, 106 Stat. 1479; 47 U.S.C. 535(e). As with commercial stations, the 1992 Act requires cable operators to

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[3] The 1992 Act provides that commercial broadcast stations may elect not to invoke the must-carry requirements, in which case they may withhold consent to retransmit their programming. See § 6, 106 Stat. 1482-1483; 47 U.S.C. 325(b)(1) and (3). If a broadcaster carries programming that is popular and attractive to a cable operator, there should be no reason to select the must-carry option, which is uncompensated.

carry the entire programming schedule of noncommercial educational stations, imposes channel positioning requirements, and limits payments allowable for the signals of noncommercial educational stations. See § 5, 106 Stat. 1479-1480; 47 U.S.C. 535(g) and (i).

2. Appellants are religious groups that disseminate programming through carriage on cable systems. J.S. App. C26-C27; J.S. 7-11. Soon after the 1992 Act was enacted, appellants in *Turner Broadcasting System, Inc.* v. *FCC*, No. 93-44, filed five consolidated actions challenging the constitutionality of Sections 4 and 5 of the 1992 Act on the ground that they violate the First Amendment's guarantee of free speech and freedom of the press.[4] Appellants in this case intervened to challenge the must-carry requirements on the ground that they violate the Establishment and Free Exercise Clauses of the First Amendment. In particular, appellants maintained that the must-carry provisions impermissibly favor religious broadcasters over religious cable programmers. J.S. App. C26-C27.

The district court rejected appellants' Establishment Clause claim under the "now familiar" framework of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), which requires that the government's conduct "(1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion." J.S. App. C27 (quoting *Lee* v. *Weisman*, 112 S. Ct. 2649, 2654 (1992)). Applying that stand-

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[4] Appellants in this case have adopted by reference the arguments of appellants in No. 93-44. We are providing appellants in No. 93-45 a copy of our motion to affirm in that case.

ard, the district court found that the must-carry provisions comply with the Establishment Clause. First, the court concluded that the must-carry provisions "clearly reflect a secular purpose." J.S. App. C28. It found nothing in the record to indicate that Congress intended to favor religious broadcasters over cable programmers or even that Congress was aware that broadcasters and cable programmers deliver different religious messages. *Ibid.* Second, the court held that because the must-carry provisions "apply to all broadcasters, without regard to whether their programming contains any religious fare at all," the primary effect of the statute was neither to advance nor inhibit religion. J.S. App. C28. Third, emphasizing that the must-carry provisions do not call for " 'detailed monitoring and close administrative contact' between the government and sectarian organizations," the court determined that they do not result in excessive government entanglement with religion. *Id.* at C29 (quoting *Hernandez* v. *Commissioner of Internal Revenue*, 490 U.S. 680, 697 (1989)).

Finally, the district court rejected appellants' Free Exercise challenge to the 1992 Act, holding that any burden on appellants' religious practice was "merely the incidental effect of a facially religion-neutral law that is generally applicable to all operators, programmers, and broadcasters." J.S. App. C29 (citing *Employment Division, Dep't of Human Resources* v. *Smith*, 494 U.S. 872 (1990)).

ARGUMENT

The must-carry provisions of Sections 4 and 5 of the 1992 Act constitute religion-neutral economic legislation designed to address market dysfunction in the video communications market and to ensure that consumers receive a diversity of programming. Those provisions are applicable to all cable operators and over-the-air broadcasters and do not favor some religious speakers over others. The district court correctly determined that the must-carry provisions do not violate the Establishment Clause or Free Exercise Clause of the First Amendment.

1. The must-carry provisions of the 1992 Act are constitutional under this Court's precedents holding that the Establishment Clause is not violated by a "neutral[]" governmental program that benefits "a broad class of citizens without reference to religion," merely because sectarian institutions also may incidentally be benefitted. *Zobrest* v. *Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2466 (1993). For example, in *Widmar* v. *Vincent*, 454 U.S. 263, 270-271 (1981), this Court held that a public university may constitutionally adopt an "equal access" policy that opens its facilities to "religious groups and speakers on the terms available to other groups." And in *Westside Community Bd. of Educ.* v. *Mergens*, 496 U.S. 226 (1990), the Court held that the Establishment Clause is not violated where a religious group benefits from the Equal Access Act, 20 U.S.C. 4071, which prohibits state secondary schools having a "limited open forum" from denying "equal access" to groups on the basis of "the religious, political, philosophical or other content" of their speech. See 496 U.S. at 248-253 (plu-

rality opinion); *id.* at 260-262 (Kennedy, J., concurring in part and concurring in the judgment).[5]

The must-carry provisions easily satisfy the requirements found crucial in those cases. The must-carry provisions require the carriage of local broadcasting stations without regard to the programming they carry (J.S. App. C15), and the provisions are therefore generally available to all broadcasting stations without regard to the sectarian or nonsectarian nature of the programming that is carried. See, *e.g.*, *Zobrest*, 113 S. Ct. at 2467; *Witters*, 474 U.S. at 488; *Mueller*, 463 U.S. at 398. For that reason, moreover, the must-carry requirements provide no governmental incentive to engage in religious broadcasting, and are not skewed toward religion. See *Zobrest*, 113 S. Ct. at 2467; *Witters*, 474 U.S. at 487. And if a broadcaster carried under the must-carry requirements engages in religious broadcasting, that is "a result of the genuinely independent and private choices" of the broadcaster. *Witters*, 474 U.S. at 487. Thus, the must-carry provisions constitute a

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[5] For other cases applying that principle, see, *e.g.*, *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2148 (1993) (use of school property for public showing of religious film after school hours permissible where property used for wide variety of organizations and no school sponsorship involved); *Zobrest*, 113 S. Ct. at 2466-2469 (funding interpreter for hearing-impaired child attending religious school merely provides incidental benefit to religion); *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 487-488 (1986) (vocational assistance under general state program may be used by recipient for religious as well as secular higher education); *Mueller* v. *Allen*, 463 U.S. 388, 398-403 (1983) (state tax credit for educational expenses, available to all parents, may be used for parents whose children attend sectarian schools).

neutral government program that assists local broadcasting stations (and, hence, their viewers) and has only an incidental effect on religion.

Consideration of the framework of *Lemon* v. *Kurtzman*, *supra*, confirms that the must-carry provisions are constitutional. Under that framework, three factors are relevant:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [third], the statute must not foster an excessive government entanglement with religion.

403 U.S. at 612-613 (citations and quotations omitted). As this Court has explained, satisfaction of those three criteria assures that a legislative enactment does not contravene the Establishment Clause. See, *e.g.*, *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2148 (1993). The must-carry provisions of 1992 Act are consistent with each of those criteria.

First, the 1992 Act was enacted with the explicit purpose of addressing market failure in the cable industry and providing a wide diversity of programming and information to viewers. As Congress's extensive findings of fact indicate (see §§ 2(a)(2)-(5), 106 Stat. 1460-1461), the cable industry, which serves more than 60 percent of the households with televisions, is highly concentrated and is characterized by substantial vertical integration. Cable operators, moreover, increasingly compete with local broadcasters for audiences and advertising revenues, and they accordingly have an economic incentive to drop broadcasters or reposition them to disadvan-

tageous channels. §§ 2(a)(12)-(17), 106 Stat. 1461-1462. As a result, Congress enacted the must-carry provisions, *inter alia*, to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media" and to "ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers." §§ 2(b)(1) and (5), 106 Stat. 1463. No indication of anything but a secular purpose appears either on the face of the statute or in the legislative record. See J.S. App. C28.[6]

Second, the primary effect of Sections 4 and 5 of the 1992 Act is to require the devotion of a limited portion of cable channel capacity to the carriage of local broadcasters, without regard to the content of their particular programming. Appellants nevertheless argue (J.S. 29-39) that the must-carry provisions of the 1992 Act run afoul of the "primary effect" requirement because they require carriage of the speech of religious broadcasters. A generally applicable statute, however, does not offend the Establishment Clause simply because it benefits religious interests or activities in a manner incidental to the secular purpose of the legislation. See, *e.g.*, *Mueller*, 463 U.S. at 398-403 (tax deduction for children's educational expenses usable for religious as well as secular schools); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 672-680 (1970) (general tax exemption available for religious as well as other non-profit groups). "If the Establishment Clause barred the extension of gen-

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[6] Contrary to appellants' assertion (J.S. 33), Congress did not refer to "religious" broadcasters in § 2(a)(15) of the 1992 Act, 106 Stat. 1462. Appellants' quotation of the statute errs in adding the word "religious" to the text.

eral benefits to religious groups, 'a church could not be protected by the police and fire departments, or have its sidewalk kept in repair.'" *Widmar*, 454 U.S. at 274-275 (citations omitted). In the absence of any "empirical evidence" that religious broadcasters "will dominate" the carriage provisions of the 1992 Act, the advancement of religion will not be their primary effect. *Id.* at 275; see *id.* at 274 ("provision of benefits to so broad a spectrum of groups is an important index of secular effect").

Third, the must-carry provisions of the 1992 Act result in no "excessive entanglement" of the government in religious affairs. That concern is not implicated when the government program, as here, merely calls for "routine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no 'detailed monitoring and close administrative contact' between secular and religious bodies." *Hernandez*, 490 U.S. at 696-697 (citations omitted). Because the 1992 Act imposes carriage requirements upon the cable operator without regard to the content of the local broadcasting to be carried, the must-carry provisions do not require any government oversight of, or involvement with, any sectarian organizations whose programming may be carried. When measured against a variety of circumstances found acceptable by this Court under the "excessive entanglement" standard, the must-carry requirements readily satisfy the requirements of the Establishment Clause. See, e.*g.*, *Board of Educ.* v. *Allen*, 392 U.S. 236, 244-245 (1968) (loan of state textbooks to religious school students must be approved as secular); *Mueller*, 463 U.S. at 403 (state tax deductions for secular texts

used in religious schools requires officials to determine which texts are secular and which are religious).

2. Appellants contend that Sections 4 and 5 of the 1992 Act violate the Free Exercise Clause because their religious programming will in many cases be dropped from cable systems as they comply with the must-carry requirements. J.S. 39-46. But to the extent the 1992 Act may burden appellants' religious activity, any such burden is an incidental effect of a facially neutral law, applied to all cable operators and all broadcasters generally. Congress did not address religious groups or target religion in any way in enacting this generally applicable legislation. Hence, it does not offend the Free Exercise Clause of the First Amendment. See *Employment Division, Dep't of Human Resources* v. *Smith*, 494 U.S. 872, 878-880 (1990); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 113 S. Ct. 2217, 2226-2233 (1993) (local ordinances adopted to target religious practices invalid under the Free Exercise Clause because not neutral or generally applicable).[7]

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[7] Appellants also argue (J.S. 49) that the 1992 Act impermissibly intrudes on cable operators' rights by requiring them to carry a religious message selected by the government. In appellants' view, that requirement implies government endorsement of the religious message. As we explain in our motion to affirm in *Turner Broadcasting System, Inc.* v. *FCC*, No. 93-44, the must-carry provisions do not impermissibly compel speech on the basis of its content. In any case, because the must-carry provisions apply "to a broad class of nonreligious as well as religious speakers," they "do[] not 'confer any imprimatur of state approval.'" *Mueller*, 463 U.S. at 397; see also *Mergens*, 496 U.S. at 252 (plurality opinion) ("broad spectrum" of clubs at secondary school "counteract[s] any possible message of official endorsement of or preference for religion or a particular religious belief").

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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